Supreme Court, U.S.
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No. 85-1954

IN THE

Supreme Court of The United States

OCTOBER TERM, 1986

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR.,
RICARDO TREVINO, JR.

Petitioners

v.

T. L. HARVILLE, LUCILLA DE LEON,
C. W. "DINKY" PRICE, J. B. FREILEY,
W. M. LAUGHLIN, ARNOLDO GONZALEZ,
CHARLES HARLESS, ZARAGOSA GARCIA, JR.,
J. W. SUTHERLAND, JIM WELLS COUNTY, TEXAS,

Respondents'

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petitioners' voluntary and independent participation in the submission and preclearance procedure under Section 5 of the Voting Rights Act comes within the definition of "action" or "proceeding" as those terms are used in 42 U.S.C. Sec. 1973 1(e) of the Voting Rights Act.

2. Whether the Petitioners can be identified as "prevailing parties" in the Section 5 preclearance procedure as that term is used in 42 U.S.C. Sec. 1973 1(e) of the Voting Rights Act.

LIST OF ALL PARTIES IN LOWER COURT PROCEEDINGS

The following is a list of all the parties to the proceedings in the Court whose judgment is sought to be reviewed.

1. Alfredo R. Arriola, Miguel V. Ramirez, Jr. and Ricardo Trevino, Jr., Plaintiffs and Petitioners herein.

2. T. L. Harville, Lucilla De Leon, C. W. "Dinky" Price, J. B. Freiley, W. M. Laughlin, Arnoldo Gonzalez, Charles Harless, Zaragosa Garcia, Jr., J. W. Sutherland, Jim Wells County, Texas, Defendants and Respondents herein.

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THE OPINIONS BELOW

The citations to the opinions below which appear in the Petition for Certiorari are correct.[1] The opinion of the Court of

[1] For purposes of appropriate references to the record, "R.Vol.1" shall refer to original papers, pleadings, orders, and other memoranda filed in this case, which has been designated as "Record on Appeal, Vol. 1." The reference to "R. Vol. 2" shall refer to the original transcript of proceedings conducted on January 5, 1983, in connection with

Appeals appears in Petitioners' Appendices at page 1a. The opinion of the District Court for the Southern District of Texas rendered on April 19, 1984, is not reported, and it appears in Petitioners' Appendices at page 38a.

STATEMENT OF THE CASE

This suit was filed by Petitioners in the District Court for the Southern District of Texas, Corpus Christi Division in August of 1978, under Section 5 of the Voting Rights Act, 42 U.S.C. Sec. 1973 (c) wherein Petitioners sought to set aside and enjoin elections conducted in Jim Wells County, Texas pursuant to a 1975 reapportionment plan which had not been precleared by the Justice Department. (Petitioners' Original Complaint at Resp.App.p A-1) The Plaintiffs-Petitioners were Mexican-American registered voters of Jim Wells County, Texas. The Petitioners sought to enjoin the November, 1978, general elections, and such Application for Preliminary Injunction was denied by a single-judge court. The Court then made the determination that a three-judge district court should be convened to hear the case. In a subsequent hearing prior to the trial on the merits, on motion by Petitioners, the case was certified as a class action. On March 19, 1979, the trial on the merits came on to be heard in connection with Petitioners' request for a permanent injunction and related relief, as more particularly described in Petitioners' Original Complaint. On October 9, 1979, the District Court

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Plaintiffs' Motion for Attorney's Fees and Costs in this cause, including all statements of counsel, the Court, and testimony of the witnesses. The designation "R. Pl. Ex." shall refer to Plaintiffs' exhibits in the Motion for Fees of January 5, 1983, and the designation "R.D.Ex." shall refer to Defendants' exhibits in the Motion for Fees of January 5, 1983. The designation of "R.D.Ex.*" shall refer to Defendants' exhibits in the trial on the merits of March 19, 1979. References to Petitioners' Appendix shall be referred to as "Pet.App.p. . . ." References to Respondents' Appendix shall be referred to as "Resp.App.p. . . ." All underscoring shall be ours unless otherwise indicated.

issued its Order and entered Findings of Fact and Conclusions of Law relative to the case, and the Court enjoined the use of the 1975 reappointment plan in any future county elections unless and until the 1975 plan was precleared according to the provisions of Section 5 of the Voting Rights Act of 1965, as amended in 1975. (Resp.App.p.A-15) Such Order and Findings of Fact and Conclusions of Law were filed with the court on October 15, 1979. In addition, in such Order Petitioners were awarded attorney fees as the prevailing parties.

On May 19, 1982, Petitioners filed their Motion for Attorney Fees and hearing was held on January 5, 1983. In such hearing Petitioners sought an award for their services in the litigation *and* their services for lobbying efforts with the Attorney General in the independent Section 5 preclearance submissions by Jim Wells County to the Justice Department. The District Court awarded attorney fees for all services rendered in connection with the furtherance of the actual litigation, but it denied Petitioners' requested attorney fees for their attorneys' voluntary lobbying efforts in the Section 5 preclearance procedure which was conducted after the injunction was granted and the actual litigation (save and except the attorney fee question) had been terminated. (Pet.App.p.38a) Petitioners' appealed to the Fifth Circuit Court of Appeals, and such court affirmed the judgment of the district court below, save and except the Fifth Circuit Court of Appeals reversed the $20.00 per hour travel time awarded to Petitioners' attorneys. Petitioners' Motion for a Hearing en Banc was denied, and they have subsequently filed their Petition for Writ of Certiorari which is now pending before this court.

STATEMENT OF FACTS

On or about February 5, 1974, pursuant to a suit filed by (73-C-125) the *Jim Wells County Women's Political Caucus et al.* v. *Jim Wells County, Texas, et, al.*, Judge Owen Cox entered a

Court approved reapportionment plan of the Commissioners' precincts of Jim Wells County, Texas. (R.D. Ex. 14*)

On or about July 11, 1975, the Jim Wells County Commissioners Court adopted a new reapportionment plan for the Commissioners' precincts of the County. (R. D. Ex. 1*-D. Ex. 5*)

On September 2, 1975, Jim Wells County Judge T. L. Harville forwarded a letter to the Department of Justice regarding the new reapportionment plan and informing the Department of same. (R. D. Ex. 6*; R. Vol. 1, p. 129, 1. 1-20; R. Vol. 1, p.130, 1. 11)

On January 18, 1977, the newly elected County Attorney, Romeo Flores, forwarded to the Department of Justice the 1975 reapportionment plan for the reason that Mr. Flores did not know if the 1975 plan had been properly submitted to the Department. (R. D. Ex. 7*, 8*)

After numerous exchanges of information and communication between Mr. Flores (in behalf of Jim Wells County) and the Department of Justice regarding submission of the 1975 plan, Mr. Drew Days, in behalf of the Department of Justice, objected to the 1975 reapportionment plan pursuant to Section 5 of the Voting Rights Act by letter dated July 3, 1978. (R. D. Ex. 8*, 10*, 11*, 11A*, 11B*, 11C*, 11D*, 11E*, 12*, 13*, 13A*; R. P. Ex. 18; R. Vol. 2, p. 129, 1. 22- p. 130, 1. 9).

This suit was filed on or about August 4, 1978, wherein Plaintiffs sought the following relief.

a. A declaratory judgment that the 1978 primary elections violated Plaintiffs' rights and the rights of those in their class;

b. An injunction to prohibit the 1978 general election;

c. A declaratory judgment setting aside the primary and general elections conducted under the 1975 reapportionment plan, which included the 1976 primary and general election and the 1978 primary and general election;

d. An order from the court requiring the scheduling of drafting, approval and implementation of a plan for apportionment of County Commissioners' precincts pursuant to Section 5 of the Voting Rights Act;

e. A permanent injunction restraining the County from use of the 1975 reapportionment of County Commissioners' precincts in any future Jim Wells County primary or general election. (R. Vol. 1, p. 272)

On March 19, 1979, trial on the merits was heard before a three-judge Court composed of the Honorable Judge Gee, the Honorable Judge Cox, and the Honorable Judge O'Connor. (R. Vol. 1, p. 197)

On October 15, 1979, the Court entered Findings of Fact and Conclusions of Law relative to this case, to which reference is made for all purposes, and it entered a permanent injunction prohibiting the use of the 1975 reapportionment plan of the Jim Wells County Commissioners' precincts in any future County elections unless and until the 1975 plan was precleared according to the provisions of Section 5 of the Voting Rights Act of 1965, as amended in 1975. (R. Vol. 1, p. 197)

The sole relief granted in this trial related to the prohibition of the future use of the 1975 reapportionment plan for Commissioners' precincts in the county, and upon entry of this order on October 15, 1979, there being no appeal therefrom, all matters in controversy between the parties had been determined by such order, save and except the question of attorney fees and costs related to the trial. (R. Vol. 1, p. 197)

After the entry of the October 15, 1979, order, the Defendants comprising the Jim Wells County Commissioners Court promptly initiated efforts to formulate a reapportionment plan to be submitted to the Attorney General for preclearance. (R. Vol. 2, p. 131, l. 2) The Commissioners Court was unsure as to the information needed by the Attorney General. (R. Vol. 2, p. 131, l. 7) The Commissioners Court entertained and reviewed numerous reap-

portiontment plans that were proposed by interested citizens, both Mexican-American and anglo, and by governmental entities and community action groups, and by the Commissioners themselves, and by the Plaintiffs through MALDEF representatives. (R. Vol. 2, p. 131, l. 2 – p. 133, l. 23) During this period of time, three separate plans were submitted to the Justice Department. Objections were made to the first two plans by the Department of Justice (R. P. Ex. 22; P. Ex. 24), and the third plan submitted was approved in October of 1981. It is the current plan used by the county. In each instance that a plan was submitted to the Justice Department, it was first approved by a majority of the Commissioners Court and then submitted to the Department. The Commissioners Court considered and evaluated all suggestions, ideas and proposals of all interested individuals and action groups prior to the approval and submission of each of their proposed reapportionment plans. (R. Vol, 2, p. 131, l. 2 – p. 133, l. 23) In connection with this entire preclearance procedure and the submission of the various reapportionment plans, the Attorney General received information, comments, and recommendations from several independent sources, and in October, 1981, the Attorney General approved a reapportionment plan, submitted by the county and rejected by the Plantiffs. (R. Vol., 2, p. 132, l. 4 – l.25; p. 89, l. 13 – l. 17; R. P. Ex. 22, p. 1; P. Ex. 24, p. 1; R. Vol. 2, p. 131, l. 2 – p. 133, l. 23; R. Vol. 2, p. 133, l. 21 – p. 134, l. 17)

Thereafter, the Petitioners filed their Motion for Attorney Fees in the District Court, wherein they claimed credit for a reapportionment plan that they had theretofore rejected. In addition, Petitioners claim and still claim they were entitled to attorney fees for the services of their attorneys after the termination of litigation and the entry of the court's order of October 15, 1979, in connection with their lobbying efforts with the Attorney General in the county's independent submission of its reapportionment plans to the Justice Department in accordance with Section 5 of the Voting Rights Act.

SUMMARY OF THE ARGUMENT

In spite of Petitioners' artful attempt to categorize the Justice Department's role in the Section 5 preclearance and submission procedure as the "remedy phase" or an "ancillary proceeding," it is clear that the Congressional intent and the application of such intent through previous judicial interpretation and case precedent indicates that the Section 5 preclearance process is not an "action" or "proceeding" within the meaning of 42 U.S.C. Sec. 1973 l(e). Applicable expressions of Congressional intent on this point indicate that the use of the terms "action" or "proceeding" means judicial actions or suits brought in the course of litigation in a state or federal court or in a state or federal agency between adverse parties for the adjudication of matters in controversy between such parties. The terms "action" and "proceeding" as used in the Voting Rights Act contemplate an adversary proceeding which is subject to an appeal procedure, and upon the conclusion of such litigation and the controversy, one of the parties shall be a "prevailing party." In connection with voting rights infringement cases, the provisions of 42 U.S.C. Sec. 1973 l(e) and 42 U.S.C. Sec. 1988 certainly contemplate that "actions or proceedings" may be initiated to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, and that attorney fees may be awarded an aggrieved private party wherein they have "prevailed" in the "action" or "proceeding." However, the preclearance process is not a private enforcement proceeding within the meaning of the Voting Rights Act.

The Section 5 preclearance and submission procedure provides a definite procedure to alter the voting qualifications, practices or standards of a state or political subdivision covered under the Voting Rights Act. The Attorney General of the United States has complete and total control and discretion in connection with the approval or objection to a submitted voting change, and the decision of the Attorney General is not subject to appeal. In the

preclearance process there is no "prevailing party," no adversary proceeding, no pleadings or judgment and no adjudication of rights. The Attorney General simply either approves or disapproves the submitted voting change as a function and responsibility of this portion of the executive branch of government. In this preclearance function, the Attorney General does not adjudicate nor does it serve in any capacity as a judicial body.

The distinction between "actions" or "proceedings" under the Voting Rights Act and the executive duties of the Attorney General in the preclearance process has been made clear through applicable authority and precedent; and, simply stated, the preclearance process is not an "action" or "proceeding" within the meaning of the Voting Rights Act.

The Court of Appeals has correctly applied applicable precedent in connection with the denial of attorney fees for Petitioners' lobbying efforts and activities in the preclearance procedure for Jim Wells County, Texas, independent submission of their reapportionment plans to the Attorney General. It is clear that the Petitioners failed to show that their involvement and participation in the preclearance process changed the results or opinion that the Attorney General would otherwise have reached in considering the Respondents' reapportionment plans; and the Petitioners' activity in the submission process was not in the furtherance of the litigation between the parties, but rather, it occurred after the litigation had terminated and the issues in controversy had been judicially resolved.

REASONS FOR THE DENIAL OF THE WRIT

ARGUMENT

I. THE SECTION 5 PRECLEARANCE PROCESS UNDER THE FACTS OF THIS CASE IS NOT AN "ACTION" OR "PROCEEDING" WITHIN THE MEANING OF 42 U.S.C. Sec. 1973 1(e).

The Petitioners' goals, objectives and requested relief in connection with this suit were best expressed originally in their complaint and Application for Injunction. (Resp. App. p. A-1) Although numerous claims and requested relief by Petitioners were denied in the trial on the merits, the three-judge Court did enter a permanent injunction prohibiting the use of the 1975 Reapportionment Plan of the Jim Wells County Commissioners precincts in any future county elections unless and until the 1975 Plan was precleared according to the provisions of Section 5 of the Voting Rights Act. The primary question in the trial on the merits dealt with the issue of whether the county had complied with the Section 5 preclearance process. Because of the nature and timing of the original communications and submissions between the county and the Justice Department on the county's submission of the 1975 Reapportionment Plan, there was an open question concerning the county's compliance with the Section 5 preclearance process. Once that question was determined and the three-judge-court ruled that the 1975 plan had not been properly precleared, the Commissioners Court did not appeal the order, and promptly initiated efforts to formulate a Reapportionment Plan to be submitted to the Attorney General for preclearance. (R. Vol. II, p. 131, l. 2) The order of the three-judge court had determined and settled all issues and claims in controversy between the parties save and except the question of attorney fees and the controversies between the parties have been fully adjudicated. As to the issues adjudicated by the three-judge court, the Petitioners have been found to be "prevailing parties," and they have properly been awarded attorney fees for such proceeding.

Petitioners now make claim for their attorney fees and costs incurred in their voluntary involvement in the Section 5 preclearance process that occurred with the Department of Justice after the final adjudication of issues in this case, and after the entry of the order of the District Court on such issues. The key question of this appeal pertains to the Petitioners' right, if any, to claim additional attorney fees for their voluntary involvement in

the Section 5 preclearance process for which the Attorney General is solely responsible. These Respondents object to any award to Petitioners for attorney fees and costs incurred by Petitioners in the preclearance process that occurred after the District Court's order of October 15, 1979, for the reason that such services were not rendered in an "action or proceeding" for enforcement of the provisions of U.S.C. Sec. 1973 l(e) and 42 U.S.C. Sec. 1988 by a private party or person.

The provisions of 42 U.S.C., Sec. 1973 1(e) and 42 U.S.C., Sec. 1988 certainly contemplate that "actions or proceedings" may be initiated to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, and that such action may be initiated by the Attorney General or by an aggrieved person or persons. *Allen* v. *State Board Elections,* 89 S.Ct. 817 (1969). In accordance with the above statutory provisions, attorney fees may not be awarded in those instances wherein the Attorney General enforces such provisions, and they may only be awarded when the action or proceeding is initiated and enforced by one or more aggrieved private parties, and such fees are only awarded wherein such party has "prevailed" in the action or proceeding. 42 U.S.C., Sec. 1973 1(e).

In those instances wherein the enforcement is by private party, such individual either files a suit in the appropriate Federal or state court, or he files a complaint with an appropriate Federal or state agency. In either event the person enforcing the aforementioned provisions is a *necessary party* to the "action or proceedings," and the rights of such party are adjudicated by the court or the administrative agency. In either event, the initial adjudication, whether by state or Federal court, or whether by state or Federal agency, is subject to an appeal procedure. The process of enforcement by private party is best illustrated by *New York Gas Light Club, Inc.* v. *Carey,* 100 S. Ct. 2024 (1980). In the *New York Gas Light* case, the Supreme Court has identified the type of proceedings in Title VII cases that authorize a fee award to a

prevailing party. The court states that the statute uses the word "proceeding" to describe the remedies to which "complaintants *are required* to resort" for enforcement of the statute. It seems clear from the ruling in such case that in those instances wherein the "complaining party" is a necessary party to the proceeding, or wherein the proceeding is an adversary proceeding, or wherein the rights of the party are to be adjudicated in the proceedings, that such "proceeding" shall authorize a fee award to a prevailing party or person within the context of 42 U.S.C., Sec. 1973 1 (e) and 42 U.S.C., Sec. 1988.

By contrast, the preclearance provisions of Section 5 of the Voting Rights Act [42 U.S.C. Sec., 1973 (c)] provides for a definite procedure to alter the voting qualifications, practices or standards of a state or political subdivision covered and included within this Act. As stated in such provision, in order to alter the voting practices within the political subdivision, an action may be initiated in the United States District Court for the District of Columbia for a declaratory judgment that such altered voting practice does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or alternatively, the altered voting practice may be submitted by the chief legal officer of the political subdivision to the Attorney General for approval. 42 U.S.C., Sec. 1973 (c).

In connection with such provisions, the Department of Justice has enacted regulations to administer the aforementioned statute. These regulations have the same effect and legal import as Federal law, and these provisions are embodied in 28 C.F.R. part 51 et seq., *Harris* v. *Levi,* 416 F. Supp. 208 (D.C.D.C., 1976), affirmed in part, vacated in part on other grounds and remanded, 562 F.2d 772. These administrative procedures provide detailed guidelines for a political subdivision in attempting to comply with the provisions of 42 U.S.C. Sec. 1973 (c). If a reapportionment plan is submitted to the Attorney General for approval, such approval or disapproval is within the sole discretion of the Attor-

ney General, which discretion is based upon relevant judicial decisions, a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation, surveys or information secured independently by the Department of Justice. (28 C.F.R., 51.28)

Regardless of the decision of the Attorney General to approve or object to the submitted voting change, there is no appeal that can be made from this decision. *Briscoe* v. *Bell,* 97 S. Ct. 2428 (1977); *Morris* v. *Gressette,* 97 S.Ct. 2411 (1977. The only remedy available to the political subdivision is to attempt to comply under the Act by means of a suit for declaratory judgment in the Federal District Court of the District of Columbia. It is obvious from a study of these regulations that the only required parties in interest are the submitting political subdivision and the Attorney General. During the submission period, the submitting authority, and any other person or group, may submit information to the Attorney General (28 C.F.R., 51.28), but only the submitting party and the Attorney General are necessary parties to this procedure. The participation of any other person in disseminating information to the Attorney General is done strictly on a voluntary basis, and not on a *required* basis. Therefore, there is no adversary procedure or proceeding between any one of the parties, whether such parties are mandatory parties or voluntary party participants.

The preclearance procedure outlined in 42 U.S.C., Sec. 1973 (c) and in related Department of Justice regulations (28 C.F.R. 51 et seq.), *are not enforcement proceedings* under this Act, but rather they are the statutory and regulatory *guidelines for compliance* under this Act. Enforcement proceedings by the Attorney General or private party under this Act only arise after there has been a refusal to abide by these guidelines by the political subdivision. The enforcement actions or proceedings, contem-

plated by this Act that may then be initiated by the Attorney General or by a private party are as follows:

1. An individual or group of individuals may file a suit for a declaratory judgment and/or injunctive relief to prohibit violation of the section; or

2. The Attorney General may file a suit for declaratory judgment and/or injunctive relief to prohibit violation of the section. *Allen* v. *State Board of Elections,* 89 S. Ct. 817 (supra); *Heggins* v. *City of Dallas,* 469 F. Supp. 739 (D.C. Tex., 1979); *Horry County* v. *United States,* 449 F. Supp. 990 (D.C.D.C., 1978); *Citizens Committee to Oppose Annexation* v. *City of Lynchburg, Va.,* 400 F. Supp. 68 (D.C. Va., 1975); affirmed in part, vacated in part on other grounds, 528 F. 2d 816; appl. denied 96 S. Ct. 766.

The enforcement relief that a private litigant is entitled to for violation of 42 U.S.C. 1973 (c) is a judicial declaration that the political subdivision enactment in question falls under the requirements of the above provision, and an injunction against the enforcement of the political subdivision enactment until such subdivision has properly complied with the provisions under this section. *Weber* v. *White,* 442 F. Supp. 416 (D.C. Tex. 1976).

The statutory design of the preclearance process is "independent of private remedies for the enforcement of the Voting Rights Act," and therefore, it cannot be said that Congress intended the preclearance process to be an integral part of private enforcement mechanisms. *Posada* v. *Lamb County*, 716 F. 2d 1066 (5th Cir., 1983) Although the *Posada* court recognized that there was no textual interpretation of the word "proceeding," as used in Section 1973 l(e) and Section 1988 of the Voting Rights Act to indicate that the term "proceeding" would include preclearance procedures, the court recognized that the terms "proceeding" and "action" were used interchangeably throughout the statute to refer to *judicial proceedings.* Although it was not necessary in the

Posada case for the court to reach the threshold question of whether the terms "proceeding" or "action" would include the preclearance process, the court strongly and clearly inferred to the contrary; that such preclearance process was not within the meaning of the terms "action" or "proceeding."

Since the *Posada* case, the precise question in issue in this case has been determined in *Gerena-Valentin* v. *Koch*, 739 F. 2d 755 (2nd Cir., 1984), and a detailed study of the legislative history and the Congressional intent regarding such issue is presented in the case. In such case, the court holds that:

> "There is thus little or no textual warranty for a construction for the fee awards provision which applies it to lobbying in preclearance reviews not in aid of catalytic litigation.
>
> "The legislative history also contains no suggestion that awards of attorney's fees can be made for work solely in connection with preclearance reviews. We set out in the margin portions of the abundant legislative history indicating that the purpose of counsel fee awards under Section 1973 1(e) was to encourage meritorious litigation. No indication of an intent to award fees for efforts in a preclearance review can be found in that history."[2]

The decision of the Court of Appeals in this case is consistent with both Congressional intent and applicable authority which is

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[2] The court analyzed expressions of Congressional intent by an analysis of the Senate report on Section 1973 (c) and Section 1973 1(e) of the Voting Rights Act as stated in S. Rep. No. 295 94th Cong., 1st Sess. 40 (1975), reprinted in 1975 in U.S. Code Cong. & Ad. News, 774, 807. The legislative history to both Section 1973 1(e) and Section 1988 indicate that they were intended to create consistency in fee award standards in civil rights cases. The court also analyzed S. Rep. No. 1011 94th Cong., 2nd Sess. 1-4 (1976), reprinted in 1976 in U.S. Code Cong. & Ad. News, 5908-12, as regards the Congressional intent of attorney fees under Section 1988. "Nothing in the legislative history of Section 1988 suggests that Congress contemplated fee awards for work done in administrative proceedings unrelated to successful litigation. A contrary intent is indicated by the following excerpts from the Senate and House reports: ... (citing specific references)".

directly on point with the question of law before this court. Accordingly, this Petition for Writ of Certiorari should be denied.

II. THE TERM, "PREVAILING PARTY," HAS NO APPLICATION TO THE SECTION 5 PRECLEARANCE PROCEDURE, AS OUTLINED IN THE VOTING RIGHTS ACT, AND AS CODIFIED IN THE CODE OF FEDERAL REGULATIONS, 28 C.F.R., Section 51 et seq.

In accordance with 42 U.S.C. Sec. 1973 1(e), in addition to the requirement that the controversy must be an "action" or "proceeding" to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, the parties seeking payment of reasonable attorney fees incurred in the litigation or action must be a "prevailing party." It has been well established that a party must be a "prevailing party" in order to be awarded attorney fees under this Act. *Ward* v. *Dearman,* 626 F. 2d 489 (5th Cir., 1980); *Bly* v. *McLeod,* 605 F. 2d 134 (4th Cir., 1979), cir. denied 100 S.Ct. 1350

In connection with the term "prevailing party," the preclearance procedure outlined in 42 U.S.C. Sec. 1973 (c) and related regulations do not contemplate an adversary proceeding or any "prevailing party." Such provisions are simply guidelines for compliance with this Act. A political subdivision either complies under the Act, or it does not. The very nature of this Act and the provisions require that the Attorney General shall always have matters determined as he chooses, unless the political subdivision files suit for a declaratory judgment in the Federal District Court of the District of Columbia. "Once a plan has been submitted to the Attorney General, although interested parties may voice their opposition to or support of the plan, the final decision is the Attorney General's alone." *Commissioners Court of Medina County, Texas* v. *United States,* 683 F. 2d 435 (D.C. Cir., 1982)

If by the very nature of the preclearance procedure it is not an enforcement action under the Voting Rights Act, and if in such

preclearance procedure there can be no determination of a "prevailing party," then there can be no award for attorney fees for such private party services in the preclearance process.

Accordingly, for the reasons stated above, the Petition for Writ of Certiorari should be denied.

III. THE COURT OF APPEALS' DECISION CORRECTLY APPLIED *WEBB* v. *BOARD OF EDUCATION OF DYER COUNTY*, AND APPLICABLE AUTHORITIES.

Prior to the Fifth Circuit's opinion in *Arriola et al.* v. *Harville et al.*, 781 F. 2d 506 (5th Cir., 1986), such court had expressly withheld opinion on the question of the applicability of attorney fees for services rendered in preclearance activities, stating, however, that if such fees can be obtained at all,

> "the award must be justified by showing that the private objectors' participation through particularly astute criticism or creative legal argument, changed the result that the Attorney General would otherwise have reached. We will not presume that the Attorney General has failed adequately to satisfy his statutory obligations to enforce the public interest in compliance with the voting rights legislation, or that the reservations the Attorney General voiced would have passed unnoticed absent objections filed by private parties."

Posada v. *Lamb County, Texas*, supra, at page 1075; citing *Donnell* v. *United States*, 682 F. 2d 240 (D.C. Cir., 1982)

On Petitioners' Motion for Attorney's Fees and Costs, the District Court has expressly found that there was "no convincing tie-in between Petitioners' complaints expressed in their comments to the Attorney General and his results" and that there was "no showing that the Attorney General changed the results he would have achieved because of anything the Petitioners did."

Rule 52 (a) of the Federal Rules of Civil Procedure provides that "findings of fact shall not be set aside unless clearly erroneous." F.R.C.P., p. 52(a) As the fact finder in this case, it was

the District Court's province to determine and resolve conflicts in the testimony. The findings and conclusions made by the District Court on the issue of whether the Petitioners' involvement in the preclearance process had a substantial independent effect on the outcome of the preclearance decision of the Attorney General cannot be set aside unless such findings and conclusions are clearly erroneous. *Pullman-Standard* v. *Swint,* 102 S.Ct. 1781, 1788 (1982) The evidence in this case clearly supports the District Court's findings and conclusions. Petitioners' own lead counsel, Mr. Avila, testified that he had no knowledge that the decisions made by the Justice Department to object to any reapportionment plans submitted by Jim Wells County were based upon the comments or recommendations of MALDEF. (R. Vol. 2, p. 91, l. 3) He further stated that the Justice Department's information and letters of objection to the Jim Wells County Reapportionment Plans could have been made independent of the comments and recommendations of MALDEF. (R. Vol. 2, p. 91, l. 13)

There is ample evidence that the Attorney General in the preclearance process was receiving information, comments and recommendations from several independent sources, including individuals from the Jim Wells County community, the Commissioners Court, the Council of Governments, various commissioners and MALDEF. (R. Vol. 2, p. 132, l. 4-25; R. Vol. 2, p. 89, l. 13-17; R. Pl. Ex. 22, p. 1; R. Pl. Ex. 24, p. 1)

Although Petitioners now for the purposes of this appeal take credit for the approval of the 1981 Jim Wells County Reapportionment Plan, the Plan actually originated in the Commissioners Court. (R. Vol. 2, p. 133, l. 21) The plan that was approved by the Attorney General (this plan is now in force in Jim Wells County) was rejected as unsatisfactory by the Petitioners prior to its submission and approval. (R. Vol. 2, p. 134, l. 11) Nonetheless, such plan was submitted and approved by the Attorney General without the approval of Petitioners. (R. Vol. 2, p. 134, l.

21) The approval or objection to such plan by the Attorney General is not subject to judicial review [*Briscoe* v. *Bell,* 97 S. Ct. 2428, 1977; *Morris* v. *Gressette,* 97 Sup. Ct. 2411, (1977)], and Petitioners have now quickly taken credit for the approval of such plan.

The evidence presented by Petitioners in connection with their claim that the Attorney General was motivated in his decision by the actions of Petitioners and their attorneys is nothing more than sheer speculation and conjecture, as such decision, in the words of Petitioners' own counsel, could have been made independently from any actions of Petitioners.

Therefore, the decision of the Court of Appeals was not inconsistent with the *Posada* case except that the *Arriola* court did pass on the ultimate question of the applicability of attorney fees for preclearance activities.

Petitioners also maintain that the Court of Appeals has misconstrued *Webb* v. *Board of Education of Dyer County,* 105 S. Ct. 1923, 85 L. Ed. 2d 233 (1985). Petitioners also cite as applicable precedent *Hensley* v. *Eckerhart,* 461 U.S. 424; 103 S. Ct. 1933; 76 L. Ed. 2d 40 (1983). Respondents disagree that the foregoing cases have been misapplied. In fact, such cases support the decision of the Court of Appeals and are applicable and in point to the decision in the court below.

The gist of the decision in *Webb* is that a prevailing party can recover attorney fees in an ancillary administrative proceeding if the services rendered were both useful and of a type ordinarily necessary for the successful advancement of the civil rights litigation. *Hensley* holds that compensation should be provided only for those hours which are reasonably expended on the *litigation.*

Under either decision, the Petitioners cannot prevail for the following reasons:

1. There was no evidence to support any contention that the Petitioners' efforts were useful to the Attorney General in his ultimate decision not to object to the current Jim Wells County reapportionment plan. In fact, the express finding of the District Court was that there was no convincing tie-in between the efforts of Petitioners and the decision of the Attorney General;

2. In the light of applicable authority cited herein, it is doubtful as to whether the preclearance process can be characterized as an ancillary administrative "proceeding" for which the recovery of attorney fees would be awarded;

3. The voluntary lobbying efforts of Petitioners and their attorneys in the preclearance process is not the type of service or work product that is ordinarily necessary to advance the litigation, in light of the fact that Petitioners' communications are not necessary to any decision that will be made by the Attorney General; and moreover, the decision of the Attorney General can be made upon information which is totally independent of any information or activities of the Petitioners or their attorneys;

4. The voluntary lobbying efforts of the Petitioners and their attorneys were not conducted in the furtherance of the litigation, nor was any issue determined in the preclearance process which was utilized in the litigation; and in fact, the litigation had terminated and all issues in controversy as set out by the pleadings had been resolved by the Court's Order of October 15, 1979. The Petitioners' subsequent involvement in the preclearance process was conducted independently of the litigation, and after its termination.

It is indeed very convenient for Petitioners to now say that their participation in the preclearance process was necessary to the accomplishment of their full relief. However, in accordance with their requested relief in their pleadings and the rulings of the

three-judge court, they received all the relief to which they were entitled, and attorney fees were awarded in connection with such a relief. During the preclearance and submission procedure of Jim Wells County, the participation of the Petitioners was not necessary for the ultimate decision of the Attorney General. As stated in *Posada*, the courts will not presume that the Attorney General will fail to adequately satisfy his statutory obligations to enforce and protect the public interest in compliance with voting rights legislation; nor will the courts assume that the decisions of the Attorney General would not have been made but for the objections of private parties. *Posada* v. *Lamb County*, supra, at page 1075.

Therefore, in line with the foregoing, the Petitioners cannot be heard on their claim that their participation in the preclearance process was essential to the litigation, or that such participation in any manner motivated the decision of the Attorney General.

CONCLUSION

Accordingly, for the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

J. G. ADAMI, JR.*
PERKINS, ODEN,
WARBURTON,
MCNEILL & ADAMI
Post Office Drawer 331
Alice, Texas 78333
(512) 668-8101

* Counsel of Record:
Application for Appearance in the Supreme Court Pending

APPENDIX

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Clerk, U.S. District Court
Southern District Of Texas
FILED
Aug. 4, 1978
V. Bailey Thomas, Clerk
Deputy: C. MARBLE

APPENDIX A

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ALFREDO R. ARRIOLA, MIGUEL V. RAMIREZ, JR. and RICARDO TREVINO, JR., Individually and On Behalf of All Others Similarly Situated,

Plaintiffs

v.

T. L. HARVILLE, Individually and in His Official Capacity as Jim Wells County, Texas, County Judge; LUCILLA DE LEON, C. W. "DINKY" PRICE, J. B. FREILEY and W. M. LAUGHLIN, Individually and in Their Official Capacities As County Commissioners of Jim Wells County, Texas; ARNOLDO GONZALEZ, Individually and in His Official Capacity as Jim Wells County, Texas, County Clerk; CHARLES HARLESS, Individually and in His Official Capacity as Sheriff of Jim Wells County, Texas; ZARAGOZA GARCIA, JR., Individually and in His Official Capacity as Democratic Party Chairman of Jim Wells County, Texas; J. W. SUTHERLAND, Individually and in His Official Capacity as Republican Party Chairman of Jim Wells County, Texas, and Jim Wells County, Texas.

Defendants

CIVIL ACTION
NO. C-78-87

COMPLAINT

1. This is an action seeking to enjoin the Defandants, and all their successors in interest, from holding general elections under

the apportionment plan governing the election of the commissioners, constables and justices of the peace of the County Commissioners' Court of Jim Wells County, Texas, and to set aside the party primaries for these offices. This apportionment plan was objected to by the United States Attorney General pursuant to the Voting Rights Act of 1965 on July 3, 1978. The apportionment plan is, therefore, without legal force or effect. Plaintiffs pray for an injunction of any further primary or general elections under the illegal apportionment plan, and for a schedule requiring the drawing up and submission for approval under the Voting Rights Act of a plan of apportionment in time for the November, 1978, general elections or soon thereafter.

JURISDICTION

2. Jurisdiction of this Court is invoked pursuant to 42 U. S. C. § 1973c and 28 U. S. C. § 2201.

PLAINTIFFS

3. Plaintiff Alfredo R. Arriola is a registered voter who resides in County Commissioner's Precinct No. 1, Jim Wells County, Texas. He is a United States citizen of Mexican descent.

4. Plaintiff Miguel V. Ramirez, Jr. is a registered voter who resides in County Commissioner's Precinct No. 1, Jim Wells County, Texas. He is a United States citizen of Mexican descent.

5. Plaintiff Ricardo Trevino, Jr. is a registered voter who resides in County Commissioner's Precinct No. 2, Jim Wells County, Texas. He is a United States citizen of Mexican descent.

DEFENDANTS

6. Defendant T. L. Harville is the duly elected and acting County Judge for Jim Wells County, Texas. In his capacity as County Judge, Defendant Harville is presiding officer and member of the Jim Wells County, Texas, County Commissioners' Court, and a member of the County Election Board. Defendant Harville is authorized by TEX. ELECTION CODE art. 4.02 to order the election of and issue writs of election for the election of county commissioners in Jim Wells County.

7. Defendant Lucilla De Leon is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 1, and in this capacity is a member of the Jim Wells Commissioners' Court.

8. Defendant C. W. "Dinky" Price is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 2, and in this capacity is a member of the Jim Wells County Commissioners' Court.

9. Defendant J. B. Freiley is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 3, and in this capacity is a member of the Jim Wells County Commissioners' Court.

10. Defendant W. M. Laughlin is the duly elected and acting Commissioner of Jim Wells County Commissioner's Precinct No. 4, and in this capacity is a member of the Jim Wells County Commissioners' Court.

11. Defendants Harville, De Leon, Price, Freiley and Laughlin comprise the Jim Wells County Commissioners' Court and are hereby authorized by the Texas Constitution, TEX. CONST. art. 5 § 18, to divide the county into four county commissioners' precincts, with one commissioner to be elected from each precinct.

12. Defendant Arnoldo Gonzalez is the duly elected and acting County Clerk of Jim Wells County, Texas, and by virtue of that office is a member of the Jim Wells County Election Board.

13. Defendant Charles Harless is the duly elected and acting Sheriff of Jim Wells County, Texas, and by virtue of that office is a member of the Jim Wells County Election Board.

14. Defendant Zaragoza Garcia, Jr. is the duly elected and acting chairman of the Jim Wells County Democratic Party, and by virtue of that office is a member of the Jim Wells County Election Board and charged with the responsibility of conducting the Democratic primaries in Jim Wells County, Texas.

15. Defendant J. W. Sutherland is the duly elected and acting chairman of the Jim Wells County Republican Party, and by virtue of that office is charged with the responsibility of conducting the Republican Party primaries in Jim Wells County, Texas.

16. Defendants Harville, Gonzalez, Harless, Garcia and Sutherland, as Jim Wells County Judge, Jim Wells County Clerk, Jim Wells County Sheriff, Jim Wells County Democratic Party Chairman and Jim Wells County Republican Party Chairman, respectively, are required pursuant to TEX. ELECTION CODE art. 7.07 to sit as the County Election Board to furnish necessary supplies such as ballot boxes, guard rails, and voting machines to hold and conduct elections for the Jim Wells County Commissioners' Court.

17. Defendant Jim Wells County is a political subdivision subject to the requirements of the Voting Rights Act of 1965, as amended.

18. Defendants Harville, De Leon, Price, Freiley, Laughlin, Gonzalez, Harless, Garcia and Sutherland are both sued in their official and in their individual capacities.

CLASS ACTION

19. Plaintiffs bring this action pursuant to Rule 23(b) (2), F.R. CIV. P., on their own behalf and on behalf of all Mexican Americans whose right to vote has been or will be abridged by the present apportionment scheme of the Jim Wells County Commissioners' Court. The class is so numerous as to make joinder of all members impracticable. There are questions of law and fact common to each member of the class, and the claims of the representative Plaintiffs are typical of the claims of all members of the class. The representative Plaintiffs will fairly and adequately protect the interests of the class. The Defendants have acted and failed or refused to act on grounds and in a manner generally applicable to the Plaintiff class, and injunctive relief is therefore appropriate with respect to the class as a whole.

FACTS

20. On August 6, 1975, the Voting Rights Act of 1965 was extended and amended to cover the State of Texas. States and political subdivisions covered by the Act must comply with certain specified procedures. Among them is the requirement that all qualifications, prerequisites, standards, practices, or procedures with respect to voting different from those in effect on November 1, 1972, must be adjudged by either the United States Attorney General or the U. S. District Court for the District of Columbia not to have the purpose or effect of denying or abridging the right to vote on account of race, color or membership in a language minority group.

21. On August 11, 1975, Jim Wells County Commissioners' court instituted a new apportionment plan for the Jim Wells County Commissioners' Precincts. This new reapportionment plan constituted a voter qualification, prerequisites to vote, or standard, practice, or procedure with respect to voting different from those in effect on November 1, 1972.

22. Upon information and belief, the Jim Wells County apportionment was deemed completely submitted to the Justice Department on May 5, 1978.

23. On July 3, 1978, the United States Attorney General objected to the reapportionment of Jim Wells County. (See Plaintiffs' Exhibit No. 1.).

24. Upon information and belief no action has been instituted in the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act of 1965 for a declaratory judgment that the 1975 reapportionment of the Jim Wells County Commissioner Precincts, neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in an applicable language minority group.

CAUSE OF ACTION

25. In respect to this cause of action, Plaintiffs reallege and incorporate all the allegations contained herein.

26. This action arises under the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c. Since the August 11, 1975 redistricting plan was not precleared by the United States Attorney General, the election change is unenforceable. Any elections conducted pursuant to this election change are void and will violate the rights of Plaintiffs and their class as secured by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Unless enjoined, Defendants will conduct the November 1978 general elections pursuant to an election change clearly in violation of the Voting Rights Act.

27. This is also an action for declaratory, preliminary, and permanent relief instituted pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2201. Plaintiffs seek a declaration that the 1978 party primary elections conducted pursuant to the August 11, 1975 reapportionment violated the rights of Plaintiffs and their class as

secured by the Voting Rights Act. Plaintiffs also seek a declaration that any future elections conducted pursuant to the August 11, 1975 reapportionment will continue to be in violation of the rights of Plaintiffs and their class as secured by the Voting Rights Act.

28. Plaintiffs and their class have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit for declaratory judgment and injunctive relief is their only means of securing adequate redress from Defendants' unlawful practices. Plaintiffs and their class will continue to suffer irreparable injury from Defendants unless enjoined by this Court.

REQUEST FOR A THREE JUDGE COURT

29. Pursuant to 42 U.S.C. § 1973c, a district court of three judges is requested at the earliest possible date to determine the matters contained in Plaintiffs' cause of action.

PRAYER

WHEREFORE, Plaintiffs and their class respectfully pray that this Court:

A. Determine by order pursuant to Rule 23 of the Federal Rules of Civil Procedure that this action be maintained as a class action;

B. Grant a declaratory judgment that Defendants' actions violate the rights of Plaintiffs and their class as secured by the Voting Rights Act, 42 U.S.C. § 1973c;

C. Grant any preliminary and permanent injunctive relief enjoining Defendants, their successors in office, agents, employees, attorneys and those persons acting in concert with them or at their direction from holding further elections implementing any objectionable election change until and unless

such election change has been approved pursuant to Section 5 of the Voting Rights Act;

D. Grant other appropriate relief to order a schedule for the drafting, approval and implementation of a reapportionment plan pursuant to Section 5 of the Voting Rights Act of 1965;

E. Grant an Order setting aside the 1978 party primary elections for the offices of county commissioners and other offices utilizing the objectionable County Commissioner Precincts as districts;

F. Grant an Order for a new election schedule utilizing a reapportionment plan which has been precleared pursuant to Section 5 of the Voting Rights Act of 1965;

G. Grant other costs to the Plaintiffs and a reasonable award of attorneys' fees;

H. Retain jurisdiction until all orders and mandates of the Court have been complied;

I. Grant such other and further relief as the Court may deem just and proper.

Dated: August 3, 1978

Respectfully submitted;

Local Counsel:
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Alice, Texas 78332

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By JOAQUIN G. AVILA
JOAQUIN G. AVILA

Attorneys for Plaintiffs

STATE OF TEXAS }
COUNTY OF BEXAR }

BEFORE ME, on this day personally appeared Joaquin G. Avila who after being by me first duly sworn on his oath, deposes and says as follows:

1. My name is Joaquin G. Avila. I am employed by the Mexican American Legal Defense and Educational Fund, 201 N. St. Mary's Street, Suite 517, San Antonio, Texas 78205.

2. That the attached letter is a duplicate copy of the original letter received in our office; that the reason for said duplication is that the original letter was illegible.

Further in this matter affiant sayeth not.

JOAQUIN G. AVILA
JOAQUIN G. AVILA

SUBSCRIBED AND SWORN TO BEFORE ME, on this the 3rd day of August, 1978.

REBECCA V. GARCIA
Notary Public in and
for Bexar County, Texas

(SEAL)

MY COMMISSION EXPIRES SEPT. 1, 1978.
REBECCA V. GARCIA
Notary Public

July 3, 1978

Mr. Romeo Flores
County Attorney
Jim Wells County
P. O. Drawer 2080
Alice, Texas 78332

Dear Mr. Flores:

This is in reference to the August 11, 1975 redistricting of the Commissioners Precincts of Jim Wells County, Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was completed on May 5, 1978.

We have analyzed the information contained in your submission, comments of other interested persons, and data obtained from the Bureau of the Census in the light of relevant judicial decisions. See, e.g., *Kirksey* v. *Hinds County Board of Supervisors,* 554 F. 2d 139 (5th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3357 (Nov. 18, 1977); *Robinson* v. *Commissioners Court,* 505 F. 2d 674 (5th Cir. 1974).

Although Mexican-Americans constitute 64 percent of the population of Jim Wells County, only one of the four commissioners is a Mexican-American. An analysis of election returns for Jim Wells County reveals a clear pattern of racial bloc voting. We note that a redistricting of the Commissioners Precincts was ordered by a Federal district court on January 18, 1974. We have not been provided information indicating why a second redistricting was necessary only one and one half years after the first. According to the statistics you have provided the 1974 plan contained a total deviation from equal population of 28.4 percentage points; the deviation under the 1975 plan is substantially greater — 40 percentage points.

Under the 1974 plan two of the four precincts had a Mexican-American population; of greater than 65 percent, and a third precinct had a Mexican-American population of greater than 60 percent. Under the submitted plan, the Mexican-American percentage is above 65 percent in only one precinct and is above 60 percent in one other.

Under Section 5 the burden is on the jurisdiction proposing a voting change to show that the new practice or procedure is not discriminatory in purpose or effect. The burden of proof is the same when a submission is made to the Attorney General as it would be in a suit for a declaratory judgment under Section 5 brought in the United States District Court for the District of Columbia. See *Georgi* v. *United States*, 411 U.S. 526 (1973). The Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.19, state:

> If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the sixty-day period, he shall, consistent with the above-mentioned burden of proof applicable in the district court, enter an objection. . . .

Under these circumstances, we are unable to conclude that the county has carried its burden of proving that the submitted redistricting plan for Jim Wells County does not have the purpose and will not have the effect of diluting the vote of Mexican-Americans. Accordingly, on behalf of the Attorney General, I must interpose an objection to this plan.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that this change has neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, the Procedures for the Administration of Section 5, 28 C.F.R. 51.21(b) & (c), 51.23, and 51.24, permit you to request the

Attorney General to reconsider the objection. However, until the objection is withdrawn or the judgment from the District of Columbia obtained, the effect of the objection by the Attorney General is to make the redistricting plan legally unenforceable.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

STATE OF TEXAS }
COUNTY OF BEXAR }

On this 3rd day of August, 1978, I, Joaquin G. Avila, attorney of record in the case styled *Alfredo R. Arriola, et al* v. *T. L. Harville, Et Al,* hereby attest that the factual allegations alleged herein are true and correct, except for those alleged on information and belief which are to the best of my knowledge true and correct.

Signed this 3rd day of August, 1978.

JOAQUIN G. AVILA

JOAQUIN G. AVILA

Subscribed and sworn to before me on this 3rd day of August, 1978, to certify which witness my hand and seal of office.

REBECCA V. GARCIA,

Notary Public

REBECCA V. GARCIA
Notary Public in and for Bexar
County, Texas

My Commission Expires Sept. 1, 1978

(SEAL)

Clerk, U.S. District Court,
Southern District of Texas
FILED
October 15, 1979
BAILEY THOMAS, CLERK
NINA SANCHEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

ALFREDO R. ARRIOLA, *et al.*, *Plaintiffs*,
v.
T. L. HARVILLE, *et al.*, *Defendants*
} CIVIL ACTION NO. C-78-87

ORDER

This cause having come to a trial on the merits, the court hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is an enforcement action instituted pursuant to section 5 of the Voting Rights Act of 1965, as amended in 1975, 42 U.S.C. § 1973c.

2. Plaintiffs are residents of Jim Wells County, Texas. Plaintiffs are registered voters and are United States citizens of Mexican descent.

3. Defendants T. L. Harville, Lucilla De Leon, C. W. "Dinky" Price, J. B. Freiley, and W. M. Laughlin are members of the Jim Wells County Commissioners' Court, Texas, and are sued in their individual and official capacities.

4. Defendant Arnoldo Gonzales is the duly elected and acting County Clerk of Jim Wells County, Texas, and in this capacity is in charge of conducting county elections. The County Clerk is sued in his individual and official capacities.

5. Defendant Charles Harless is the duly elected and acting Sheriff of Jim Wells County, Texas, and by virtue of that office is a member of the Jim Wells County Election Board.

6. Defendants Zaragoza Garcia, Jr. and J. W. Southerland are the duly elected and acting Chairmen of the Jim Wells County Democratic and Republican Parties, respectively, and by virtue of that office are members of the Jim Wells County Election Board and charged with the responsibility of conducting party primaries in Jim Wells County, Texas.

7. Defendants Harville, De Leon, Price, Freiley, Laughlin, Gonzalez, Harless, Garcia, and Southerland are sued both in their official and in their individual capacities.

8. On September 23, 1975, the Voting Rights Act of 1965 was extended and amended to cover the State of Texas. States and political subdivisions covered by the Act must comply with certain specified procedures. Among them is the requirement that all qualifications, prerequisites, standards, practices, or procedures with respect to voting different from those in effect on November 1, 1972, must be adjudged by either the United States Attorney General or the United States District Court for the District of Columbia not to have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

9. The Jim Wells County Commissioners' Court on July 11, 1975, adopted a redistricting plan for commissioner precincts.

10. On September 2, 1975, pursuant to the request of an Assistant United States Attorney General, Stanley Pottinger, County Judge T. L. Harville forwarded a letter to the Department of Justice. In his telephone request, Mr. Pottinger advised Judge

Harville that if no objection was made within 50 days of the written submission, the new plan could be assumed to be acceptable. The letter informed the Department of Justice that the county had adopted a new redistricting plan but did not describe it in any manner and did not affirmately request the United States Attorney General to evaluate the July 11, 1975, redistricting plan.

11. There was never any response to the letter of September 2, 1975, of County Judge Harville. In addition, the Department of Justice files did not show any correspondence, either oral or written, between Assistant Attorney General Stanley Pottinger and Jim Wells County officials as a result of the September 2, 1975, correspondence.

12. All elections since then have been held under the July 11, 1975 plan.

13. A later succeeding County Attorney, Romeo Flores, the then chief legal officer for the county, reviewed these matters and concluded that he was not able to determine whether or not the reapportionment of the Jim Wells County Commissioners precincts in 1975 had been submitted as required by the Voting Rights Act. He therefore communicated this uncertainty to the Department of Justice on January 18, 1977.

14. On January 18 and 21, 1977, the County Attorney forwarded the 1975 county redistricting plan to the United States Attorney General for section 5 approval.

15. On March 8, 1977, the United States Attorney General requested additional information. Among the items requested was information concerning the population and the number of registered voters, by race or language group, in each commissioner and voting precinct before and after the 1975 reapportionment.

16. On July 15, 1977, the county responded to the Attorney General's request for additional information. Included as attachments to the July 15, 1977, correspondence to the Department of

Justice were tables listing the number of registered voters per voting precinct both before and after the 1975 reapportionment. There were not total population figures by race or language group provided in this July 15, 1977, correspondence.

17. On September 16, 1977, the United States Attorney General requested additional information and reiterated the earlier request for information concerning population by race or language group in such commissioner precinct.

18. On March 15, 1978, the county responded to the September 16, 1977, request by the Department of Justice for additional information. The attachment included with the March 15, 1978, correspondence did not provide a population breakdown by language group in each commissioner precinct before and after the 1975 reapportionment, nor did it state that such information was unavailable as provided in 28 C.F.R. § 51.10(b)(8).

19. The requested information concerning total population by language group in each county commissioner and voting precinct both before and after the 1975 redistricting was never forwarded by the county to the Department of Justice.

20. On May 5, 1978, the Jim Wells County Commissioners' Court's submission of their 1975 county reapportionment to the United States Attorney General for preclearance pursuant to 42 U.S.C. § 1973c was deemed submitted.

21. On July 3, 1978, the United States Attorney General objected to the 1975 reapportionment pursuant to section 5 of the Voting Rights Act.

22. Unless enjoined by this court, Jim Wells County, Texas, will continue to implement the 1975 reapportionment of county commissioner precincts in future county elections, thereby subjecting plaintiffs to irreparable injury.

23. The 1974 redistricting plan for the county commissioner precincts in Jim Wells County was adopted by a federal court

order pursuant to litigation. The county submitted a proposed redistricting plan that ultimately became the plan adopted by the federal court. The federal court did not modify or alter the boundaries of the submitted reapportionment plan that ultimately became the plan adopted by the court.

24. Jim Wells County has not instituted a declaratory judgment in the United States District Court for the District of Columbia seeking approval of the 1974 and 1975 reapportionment of county commissioner precincts as provided in section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

Based on these findings of fact, this court enters the following conclusions of law:

1. Jurisdiction is proper before this district court. 42 U.S.C. § 1973c. The Voting Rights Act of 1965, as amended in 1975, applies to Jim Wells County, Texas.

2. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires Jim Wells County, Texas, to preclear all changes in the law affecting voting enacted after November 1, 1972.

3. The September 2, 1975, letter from Judge Harville to the Department of Justice cannot be viewed as a submission, since the letter is a mere notice and furnishes no information on the basis of which an evaluation of the plan could be attempted. It fails to meet the strict requirements of the applicable federal regulations concerning compliance with the preclearance provisions of the Voting Rights Act, *see* 28 C.F.R. § 51.1 *et seq.*, and cannot be seen as constituting even substantial compliance with them.

4. The submission of the July 11, 1975, redistricting of the Jim Wells County Commissioner precincts was not deemed completed until May 5, 1978. On two separate occasions, March 8, 1977, and September 16, 1977, the Department of Justice requested information concerning language group demography in Jim Wells County. A review of the exhibits reveals that this

information was never provided. Moreover, there was no statement that such information concerning language groups in Jim Wells County was unavailable as required pursuant to 28 C.F.R. § 51.10(b)(8). Thus, the 60-day time period stipulated in the preclearance provisions of the Voting Rights Act did not commence until May 5, 1978.

5. The 1974 redistricting plan is a court-approved plan, not a court-devised one, and must be submitted to the Department of Justice for preclearance pursuant to section 5 of the Voting Rights Act.

6. The July 11, 1975, reapportionment of the Jim Wells County Commissioner precincts has not been precleared pursuant to section 5 of the Voting Rights Act and is, therefore, unenforceable.

7. Plaintiffs will suffer irreparable injury by being required to vote pursuant to a change in the law affecting voting that has not been precleared pursuant to section 5 of the Voting Rights Act.

8. Implementation of the 1975 redistricting plan in previous county elections has resulted in a violation of the rights of plaintiffs and their class as those rights are defined by the Voting Rights Act.

9. Plaintiffs are not guilty of any laches in instituting this lawsuit.

10. Plaintiffs are to be awarded costs and reasonable attorneys' fees.

It is therefore ordered that defendants, their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with defendants are hereby permanently enjoined and restrained from using the 1975 reapportionment of the Jim Wells County Commissioner precincts in any future county elections unless and until the 1975 reapportionment plan is precleared according to the provisions of section 5 of the Voting Rights Act of 1965, as amended in 1975.

SIGNED this 9th day of October, 1979.

THOMAS GIBBS GEE
THOMAS GIBBS GEE
United States Circuit Judge

OWEN D. COX
OWEN D. COX
United States District Judge

ROBERT O'CONOR
ROBERT O'CONOR
United States District Judge